

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD  
EASTERN WASHINGTON REGION  
STATE OF WASHINGTON

LAURIE NESS AND PATRICK PAULSON,

Petitioners,

v.

CITY OF RICHLAND,

Respondent.

**CASE No. 16-1-0005**

**ORDER GRANTING  
MOTION TO DISMISS**

**I. BACKGROUND**

This matter came before the Board on Respondent City of Richland's Dispositive Motion to Dismiss Petition for Review. The Board had before it the following submittals from the parties:

- Respondent City of Richland's Dispositive Motion to Dismiss Petition for Review, July 15, 2016.
- Petitioner's Response to Respondent's Motion to Dismiss Petition for Review, July 25, 2016.
- Respondents Reply Brief on Dispositive Motion to Dismiss Petition, August 4, 2016.

**II. APPLICABLE LAW**

The Growth Management Hearings Board (GMHB) is a creature of the Legislature, without inherent or common-law powers and, as such, may exercise only those powers conferred by statute, either expressly or by necessary implication.<sup>1</sup> As a quasi-judicial

<sup>1</sup> *Skagit Surveyors & Eng'rs, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 558 (1998). Administrative agencies have the implied or incidental powers that are reasonably necessary in order to carry out the powers expressly granted. *Id.* at 564.

1 tribunal, the Board's powers are restricted to a review of those matters specifically  
2 delegated by statute.<sup>2</sup> A party cannot confer jurisdiction; all that a party does is invoke it.  
3 Statutory requirements must be met before jurisdiction is properly invoked.<sup>3</sup>

4 Under RCW 36.70A.280(1) and RCW 36.70A.290(2), the GMHB has subject matter  
5 jurisdiction to consider a petition for review if the petition alleges that a comprehensive plan  
6 or a development regulation or an amendment to a comprehensive plan or development  
7 regulation is not in compliance with the requirements of the Growth Management Act (GMA)  
8 or State Environmental Policy Act (SEPA) as it relates to plans, development regulations, or  
9 amendments thereto adopted under the GMA.  
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11 In *Alexanderson et al. v. Board. of Clark County Commissioners et al.*, 135 Wn. App.  
12 541 (2006), the Court of Appeals held that a Memorandum of Understanding (MOU)  
13 between a county and another party that requires the county to act inconsistently with its  
14 growth management comprehensive plan constitutes a de facto amendment to the plan  
15 within the meaning of the Growth Management Act (chapter 36.70A RCW) and is subject to  
16 review by the GMHB. In *Alexanderson*, although the language of the challenged agreement  
17 did not explicitly amend the County's comprehensive plan, it had the actual effect of doing  
18 so because it directly conflicted with and overrode a goal of the comprehensive plan. The  
19 MOU, in effect, superseded and amended the comprehensive plan.<sup>4</sup>  
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21 Therefore, an enforceable agreement between a city and another party that requires  
22 the city to act inconsistently with its previously adopted growth management comprehensive  
23 plan constitutes a *de facto* amendment to the plan within the meaning of the GMA and is  
24 subject to review by the GMHB.  
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### 26 27 III. DISCUSSION

28 The GMA provides for dismissal of frivolous petitions or where a person filing the  
29 petition lacks standing. RCW 36.70A.290(3). Under appellate court case law, the Board  
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31 <sup>2</sup> *Viking Properties, Inc. v. Holm*, 155 Wn.2d 112, 129 (2005).

32 <sup>3</sup> *Dougherty v. Dep't of Labor & Indus.*, 150 Wn.2d 310, 319 (2003).

<sup>4</sup> *Alexanderson et al. v. Board of Clark County Commissioners et al.*, 135 Wn. App. 541, 548- 550 (2006).

1 must dismiss a petition when the Board determines it lacks jurisdiction, since the Board has  
2 no power to adjudicate that particular case.<sup>5</sup> Under WAC 242-03-555(1), dispositive  
3 motions on a limited record to determine the Board's jurisdiction, the standing of a petitioner,  
4 or the timeliness of the petition are permitted.

5 In order for the Board to have jurisdiction over the petition, the petitioner must  
6 demonstrate that the City's legislative action adopted a comprehensive plan or an  
7 amendment to a comprehensive plan, or adopted a development regulation or an  
8 amendment to a development regulation.<sup>6</sup> In the present case, Petitioners must show that  
9 the Horn Rapids Master Plan Update requires the City to take actions that conflict with,  
10 override, or which are inconsistent with specific provisions of the City's previously adopted  
11 Comprehensive Plan/Development Regulations.

12 In its Motion to Dismiss, the Respondent asserts that the Petition raises issues that  
13 are outside the Board's subject matter jurisdiction because it's based solely on Resolution  
14 No. 78-16, which did not adopt a plan, development regulation, or amendment under the  
15 Growth Management Act or the Shoreline Management Act.<sup>7</sup> The Resolution adopted an  
16 update to the Horn Rapids Master Plan, Resolution No. 78-16 adopted on April 5, 2016,  
17 which, according to the Respondent, contains no text superseding or amending the City's  
18 comprehensive plan, does not override any provision of the plan, nor does it constitute an  
19 enforceable agreement requiring the City to act inconsistently with the comprehensive plan.<sup>8</sup>  
20 The 2016 Horn Rapids Master Plan update does not make any changes to existing zoning  
21 codes.<sup>9</sup> In general, Respondent alleges that the adopting resolution was not a GMA action,  
22 but was intended to "provide general acceptance of the business center design concepts'  
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29 <sup>5</sup> See *Crosby v. Spokane County*, 137 Wn.2d 296, 301 (1999) [If a court lacks jurisdiction over a proceeding, it  
30 "may do nothing other than enter an order of dismissal"]. See also *Griffith v. City of Bellevue*, 130 Wn.2d 189,  
31 196 (1996).

32 <sup>6</sup> *Alexanderson v. Bd. of Comm'rs*, 135 Wn. App. 541, 548 (2006).

<sup>7</sup> Respondent City of Richland's Dispositive Motion to Dismiss Petition for Review, (July 15, 2016) at 1.

<sup>8</sup> Id, at 2.

<sup>9</sup> Id.

1 on topics including land use, structural densities, public facilities and infrastructure  
2 planning.”<sup>10</sup>

3 In response to the motion, Petitioners assert that the Horn Rapids Master Plan is a  
4 de-facto subarea plan since it impacts the City’s planning goals in ways that “**are not**  
5 **addressed**” in the City’s comprehensive plan.<sup>11</sup> In addition to “**supplementing**” the  
6 Richland Comprehensive Plan, it “**inventories**” existing transportation infrastructure and  
7 “**proposes**” transportation projects that are not considered in the plan <sup>12</sup> For example, the  
8 Horn Rapids Master Plan shows an existing rail loop for unit trains that **is not inventoried** in  
9 the transportation element of the comprehensive plan.<sup>13</sup> (Emphasis added).

11 The Respondent filed a Reply Brief on August 4, 2016, which the Board officially  
12 accepts, in which it notes that the petition for review did not allege that the challenged action  
13 actually amended the comprehensive plan.<sup>14</sup> Regarding the Petitioner’s assertion that the  
14 update to the Horn Rapids Master Plan is a de-facto amendment, the Respondent cites the  
15 most recent applicable case as the *City of Woodinville, et al. v. Snohomish County*, GMHB  
16 Case No. 15-3-0016c, (Final Decision and Order, May 26, 2016).<sup>15</sup> This case cites the  
17 current law on the test for a de facto amendment:

- 19
- 20 • Whether an enforceable agreement or action has the actual effect of  
21 requiring the jurisdiction to act inconsistently with its planning, and/or
  - 22 • Whether a unilateral action makes inevitable a subsequent legislative result  
23 enacting a predetermined amendment to the comprehensive plan or  
24 development regulations.

25 The Board held a Telephonic Hearing on Richland’s dispositive motion to dismiss this  
26 case on August 29, 2016.<sup>16</sup> In preparation for the hearing, the Board specifically asked the  
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28 <sup>10</sup> Id, at 11.

29 <sup>11</sup> Petitioner’s Response to Respondent’s Dispositive Motion to Dismiss Petition for Review (July 25, 2016) at  
30 1.

<sup>12</sup> Id, at 2, 4.

31 <sup>13</sup> Id, at 5.

<sup>14</sup> Respondent City of Richland’s Reply Brief on Dispositive Motion to Dismiss Petition (August 4, 2016) at 1.

32 <sup>15</sup> Id., p.2.

<sup>16</sup> Telephonic Hearing on Motion Transcript (August 29, 2016).

1 Petitioners to focus on the two questions cited in the *Woodinville* case above: 1. How does  
2 the Horn Rapids Master Plan update conflict with its current comprehensive plan policies  
3 and development regulations? And, 2. Does the revision to the Horn Rapids Master Plan  
4 force the city to take future legislative action to amend the comprehensive plan or  
5 development regulations? In short, do the revisions limit or force future legislative changes  
6 and, if so, how?<sup>17</sup>

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8 In their legal arguments, Petitioners cited several differences between the Horn Rapids  
9 Master Plan update and the City's comprehensive plan such as more specific details in the  
10 Horn Rapids Master Plan and, even an inaccurate quote from the comprehensive plan,<sup>18</sup> but  
11 could not point to how that, in effect, changed the comprehensive plan or development  
12 regulations. For example, Petitioner's asserted that road details in the Horn Rapids Master  
13 Plan, such as the width of roadways, and roadways routed through critical areas might  
14 direct future city actions and result in the destruction of wetlands, contrary to comprehensive  
15 plan policies.<sup>19</sup> This assertion assumes, however, that the Horn Rapids Master Plan  
16 somehow overrides Richland's existing Comprehensive Plan and development regulations  
17 or will force the City to take actions that are not consistent with the plan. Also, the  
18 Petitioner's expressed concern about a rail loop that is cited in the Horn Rapids Master  
19 Plan, but not mentioned in the comprehensive plan and allegedly will force future plan  
20 related legislation.<sup>20</sup> Although the rail loop may be noted in future changes when the  
21 comprehensive plan is updated, the Petitioner's did not come forward with any evidence to  
22 show how including information about the rail loop in the Horn Rapids Master Plan is  
23 inconsistent with the comprehensive plan or will force the city to make legislative changes to  
24 the comprehensive plan.

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27 The Respondent argued that the Horn Rapids Master Plan is not an enforceable  
28 agreement and there is nothing in the plan that states that it has contractual significance or  
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31 <sup>17</sup> Notice of Telephonic Hearing on Motion (August 29, 2016) at 1.

32 <sup>18</sup> Telephonic Hearing on Motion Transcript (August 29, 2016) at 9.

<sup>19</sup> Id, at 10.

<sup>20</sup> Id, at 11.

1 is binding.<sup>21</sup> In addition, Resolution 78-16 itself doesn't have any kind of enforceable  
2 Agreement Clause. It's not a contract, nor an ordinance -- it's just a resolution that does not  
3 purport to amend any part of the City's Comprehensive Plan/Development Regulations.<sup>22</sup>

4 The Board notes that the Horn Rapid Master Plan Update includes Goals and  
5 Objectives that are consistent with the City's Comprehensive Plan. Under Goals and  
6 Objectives in the Horn Rapid Master Plan, the Comprehensive Plan goal is cited first, with  
7 several subsequently supporting Horn Rapids Plan goals. For example, the Comprehensive  
8 Plan land use Goal 2 states that: "The city will promote industrial development to provide  
9 employment for its residents, and strengthen and expand the tax base through its land use  
10 policies."<sup>23</sup> One of the subsequently cited Horn Rapids Master Plan goals is Goal 1: "Create  
11 an attractive, well-designed industrial, office and commercial center consistent with the  
12 goals and policies set forth in the Richland Comprehensive Plan."<sup>24</sup> In general, the Horn  
13 Rapids Master Plan provides for **aspirational direction** in how the area should develop and  
14 appears to compliment, not conflict with, nor in any way override the Richland  
15 Comprehensive Plan.  
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18 The Board agrees with the Respondent in that the Petitioners have not presented  
19 evidence that shows how the update to the Horn Rapids Master Plan in Resolution No. 78-  
20 16 has directly or indirectly changed Richland's Comprehensive Plan or development  
21 regulations or will force the city to take future legislative actions to amend the plan or  
22 development regulations. The Board finds and concludes that Horn Rapids Master Plan  
23 Update in Resolution No. 78-16 is not a *de facto* amendment to the City's Comprehensive  
24 Plan or Development Regulations. The Board finds that it does not have jurisdiction over  
25 the subject matter of this case, and this case must be dismissed.  
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31 <sup>21</sup> Id, at 23.

32 <sup>22</sup> Id.

<sup>23</sup> Horn Rapids Master Plan Update, EX. 17, IR 55.

<sup>24</sup> Id.

1 **IV. ORDER**

2 The Petition for Review is dismissed for lack of subject matter jurisdiction, and this  
3 case is closed.

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5 DATED this 14th day of September, 2016.  
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8 Charles Mosher, Board Member  
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11 Raymond L. Paoella, Board Member  
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14 Nina Carter, Board Member  
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